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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946.

No. 754

W. G. KORDEWICK, HENRY POTRAFKE, LAWRENCE E. PECOR, WALTER H. MILLER, B. J. BELLAND, C. T. JEWELL, W. F. CARLSON, HEATHER BROWN, W. T. GRAHAM, J. W. ROSS, R. B. LOGAN, J. E. FENNELL, E. D. GIBBS, WILLIAM C. WASSNER, CLARENCE E. BENSON, A. J. FALSTER, J. H. MAHER, W. D. HULL, J. A. RICHERME, B. J. HAINSWORTH, BEADY HINES, L. D. WHITWORTH, M. F. HOLOBOWSKI, LEO LA BEAU, H. PROUE, T. W. BRIGGS, W. H. WILDE, S. W. SLUSSER and JAMES HULL,

Petitioners,

vs.

INDIANA HARBOR BELT RAILROAD COMPANY, a corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, W. G. Kordewick, Henry Potrafke, Lawrence E. Pecor, Walter H. Miller, B. J. Belland, C. T. Jewell, W. F. Carlson, Heather Brown, W. T. Graham, J. W. Ross, R. B. Logan, J. E. Fennell, E. D. Gibbs, William C. Wassner, Clarence E. Benson, A. J. Falster, J. H. Maher, W. D. Hull, J. A. Richerme, B. J. Hainsworth, Beady Hines, L. D. Whitworth, M. F. Holobowski, Leo La Beau, H. Proue, T. W. Briggs, W. H. Wilde, S. W. Slusser and James Hull, hereby petition this Court for the issuance of a Writ of Certiorari to review the order of the United States Circuit Court of Appeals for the Seventh Circuit entered October 19, 1946, affirming the

order of the lower court entered April 30, 1946, dismissing Petitioners' suit on the ground that the Complaint of Petitioners failed to state a cause of action entitling Petitioners to relief.

The order of the Seventh Circuit became final by the denial of a Petition for Rehearing on November 6, 1946.

The Matter Involved.

A Complaint filed by Petitioners in the District Court for an accounting and entry of a money decree for Respondent's violations of certain provisions of a written contract entered into by Respondent, the Brotherhood of Railroad Trainmen, and eighteen other railroad corporations pertaining to wages, hours, working conditions and seniority rights of yardmen and switchtenders in the Chicago Switching District was dismissed upon Respondent's motion that the Complaint failed to state a cause of action entitling Petitioners to relief. The order of dismissal was on May 24, 1946 appealed to the Circuit Court of Appeals for the Seventh Circuit and by that Court affirmed on October 19, 1946. A rehearing was denied on November 6, 1946.

The Question Involved.

The Petition for a Writ of Certiorari presents the following question: Did the Seventh Circuit err in holding that Petitioners' cause of action was based upon an unwritten contract and vulnerable to the defense of the Illinois Five Year Statute of Limitations?

Reasons for the Issuance of the Writ.

The grounds for the issuance of the Writ are:

(1) The failure of the Seventh Circuit to follow the applicable Illinois law on matters involving substantive rights.

(2) The question involved is important because the decision of the Seventh Circuit bars thousands of employees in the railroad, automotive, mining, steel and other industries from exercising their rights under Illinois law to institute action for violations of the provisions of similar written contracts pertaining to hours, wages, seniority rights and working conditions, executed in their behalf by their bargaining representatives.

PRAYER FOR RELIEF.

Petitioners pray that a Writ of Certiorari be issued by this Court to review the order of the United States Circuit Court of Appeals for the Seventh Circuit, which affirmed the order of the District Court for the Northern District of Illinois dismissing Petitioners' Complaint, to the end that the order be reversed with directions to reverse the order of April 30, 1946 entered by the District Court.

Respectfully submitted,

W. G. Kordewick, Henry Potrafke, Lawrence E. Pecor, Walter H. Miller, B. J. Belland, C. T. Jewell, W. F. Carlson, Heather Brown, W. T. Graham, J. W. Ross, R. B. Logan, J. E. Fennell, E. D. Gibbs, William C. Wassner, Clarence E. Benson, A. J. Falster, J. H. Maher, W. D. Hull, J. A. Richerme, B. J. Hainsworth, Beady Hines, L. D. Whitworth, M. F. Holobowski, Leo La Beau, H. Proue, T. W. Briggs, W. H. Wilde, S. W. Slusser and James Hull,

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GOTTHARD A. DAHLBERG,
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Petitioners,

vs.

INDIANA HARBOR BELT RAILROAD COMPANY, a corporation,

Respondent.

BRIEF IN SUPPORT OF PETITION.

Jurisdiction Invoked.

Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as Amended by the Act of February 13, 1925 (43 Stat. 1938, 28 U. S. C. A., Sec. 47).

Opinion Below.

(1) The opinion of the Seventh Circuit appears in the printed record (pp. 30-33). With nothing other than the Complaint, the Motion to Strike and the Briefs of

the parties in support of and in opposition thereto, the Court held Petitioners' cause of action was based upon an unwritten contract and vulnerable to the defense of the Illinois Five Year Statute of Limitations relating to actions on unwritten contracts.

(2) The decision of the Seventh Circuit that the cause of action was based upon an unwritten contract was predicated upon a presumption of fact by that Court. A presumption, that Petitioners would be unable to sustain action upon the written contract without resorting to parol proof. This decision disregards what proof, if any, in addition to the express written contract, payroll records, car and engine movement reports, and seniority rosters would be offered by Petitioners to sustain their action. It presupposes Petitioners would resort to parol evidence.

Statement of the Case.

The District Court decided the issues on the pleadings and the admissions of fact made by the motion to dismiss the Complaint (R. 20). The Seventh Circuit affirmed this decision (R. 30-33).

ARGUMENT.

I.

The Seventh Circuit Failed to Follow the Applicable Illinois Law Involving Substantive Rights.

Ill. Rev. Stat. 1945, ch. 83, § 17, provides:

> "Actions on * * * written contracts * * * shall be commenced within ten years next after the cause of action accrued."

Ill. Rev. Stat. 1945, ch. 83, § 16, provides:

> "Actions on unwritten contracts, expressed or implied, * * * and all civil actions not otherwise provided for, shall be commenced within five years next after the cause of action accrued."

The decision of the Seventh Circuit on the question of which of these Limitation Statutes was applicable as a defense to the action in the instant case must harmonize with the interpretations of these Statutes by the Courts of Illinois. *Erie* v. *Tompkins,* 304 U. S. 64.

No express written contract exactly similar to the one in question has been construed by the Appellate or Supreme Court of Illinois.

The Seventh Circuit cited *Moore* v. *Illinois Central Railroad Co.,* 312 U. S. 630, to indicate it would apply to these Illinois Statutes of Limitation the interpretation given them by the Courts of Illinois and then held under the rulings in *The Railway Passenger and Conductors' Benefit Ass'n* v. *Loomis,* 142 Ill. 560, 567; *Mowatt* v. *City of Chicago,* 292 Ill. 578, 582; *Novosk* v. *Reznick,* 323 Ill. App. 544, 551; and *Orminski* v. *Hyland Electrical Supply*

Co., 326 Ill. App. 392; the contract in this case was an unwritten contract (R. 32).

In *Moore* v. *Illinois Central Railroad Co.*, 112 F. 2d 959, 964, construction of a written contract very similar to that here involved and the applicability of similar State Statutes of Limitations were before the Court. There, the Fifth Circuit, as here, the Seventh Circuit, found the contract was not wholly provable in writing and resort to parol proof made it subject to the defense of the State Statute of Limitations relating to the institution of actions upon unwritten contracts.

This Court, in *Moore* v. *Illinois Central Railroad Co.*, 312 U. S. 630, reversing the Fifth Circuit, approved the decision of the Supreme Court of Mississippi holding that Moore's action, although he was not named as a party to the written contract, was an action based upon a written contract made by his Brotherhood for his benefit and as such was invulnerable to the defense of the Mississippi three-year Statute of Limitations relating to the bringing of actions upon unwritten contracts.

In *The Railway Passenger and Conductors' Benefit Ass'n* v. *Loomis*, 142 Ill. 560, the action was in *assumpsit* to recover life insurance claimed to be due on a certificate of membership in the Benefit Association. The Court, at page 567, found that the certificate of membership in the Association, its constitution and by-laws contained no promise to the wife or widow; acknowledged no liability to her; did not mention her, or any particular person, as beneficiary. At page 568, the Court held the certificate of membership, the constitution and by-laws of the Association were so indefinite as to require parol testimony, not to identify them, but to determine what person had a right to bring action, and stated:

> "The oral evidence here required is something more than that which is needed for the mere purposes of identification."

In so stating, the Court recognized the general principle of law that resort to parol testimony to identify a written instrument does not detract from its character as a written instrument.

If the Seventh Circuit had recognized that general principle of law, as did the Supreme Court of Illinois, it would have found the contract in the instant case to be a written contract, the character of which would not be changed by the use of parol testimony for the purpose of identification.

The use of parol testimony in the instant case to identify the written contract, payroll records, seniority rosters, car and engine movement reports, is no basis for a presumption by the Seventh Circuit that such testimony was essential for purposes other than identification.

In *Mowatt* v. *City of Chicago,* 292 Ill. 578, the action was in *assumpsit* to recover the sum of Six Hundred Fifty-six Dollars and ninety-six cents ($656.96) paid to indemnify the city against damages that might accrue because of the vacation of a certain alley under provisions of a city ordinance passed February 10, 1908. Under Illinois Law, one sustaining damages from the closing of an alley could institute suit against the city within five years. The five year limitation period expired in February 1913. The action in *assumpsit* was instituted in December 1918. There, it was contended the action was based upon the ordinance as a written contract and the Illinois ten-year Statute of Limitations applied. It appeared from the record before the Court, that at trial in the lower Court, Appellee had resorted to the use of

parol testimony for purposes other than that of identification. The Supreme Court of Illinois, at pages 582-583, held, that as parol evidence was necessary to show there could be a recovery under the ordinance and the action was based upon an implied contract and not upon an express written contract, the Illinois five-year Limitation Statute controlled. In the instant case, the action of Petitioners is based upon an express written contract entered into by their Brotherhood for their benefit and use of parol testimony is needed solely to identify the contract.

The Seventh Circuit agrees with Petitioners' assertion that an express written contract was not involved either in *Mowatt* v. *City of Chicago*, 292 Ill. 578, or in the case of *The Railway Passenger and Conductors' Benefit Ass'n* v. *Loomis*, 142 Ill. 560, for that Circuit in *Economy Fuse & Mfg. Co.* v. *Raymond Concrete Pile Co.*, 111 F. 2d 875, analyzed these cases and at page 879 stated:

> "In *Mowatt* v. *City of Chicago*, 292 Ill. 578, there was no contract between the parties. There was a city ordinance, but it did not purport upon its face to be a contract. Parol evidence was necessary to show the existence of a contractual relationship between the parties. Likewise in *The Railway Passenger and Conductors' Benefit Ass'n* v. *Loomis*, 142 Ill. 560, the written instrument relied upon disclosed no cause of action."

In *Novosk* v. *Reznick*, 323 Ill. App. 544, plaintiffs, who had been employees of defendant, contended the contract there involved was entered into for their benefit and as third party beneficiaries they were entitled to recover. At page 549, the Appellate Court held the contracts sued upon were for the benefit of plaintiffs and as third party beneficiaries they would be entitled to recover had it not been necessary to introduce parol evidence to

show the existence of a contractual relationship. In the instant case, Petitioners were not third party beneficiaries to the written contract but were direct beneficiaries in it. Here, the contract was directly entered into by proper officers of Petitioners' organization for the benefit of a specific class of persons, namely, members of the Brotherhood employed by Respondent as yardmen and switchtenders in Respondent's yard at Blue Island, Illinois. It is not necessary in the instant case to introduce oral testimony to show existence of a contractual relationship between Petitioners and Respondent. The existence of that relationship has been admitted by the motion of respondent to dismiss the complaint of Petitioners. It was alleged in the complaint:

> (1) A written agreement pertaining to wages, hours and working conditions had been entered into between various railroad corporations and the Brotherhood of Railroad Trainmen (R. 3).
>
> (2) That Respondent was a party thereto (R. 3).
>
> (3) That Petitioners, yardmen employees of Respondent and members of the Brotherhood of Railroad Trainmen, Local 531, of Blue Island, Illinois, were parties to the agreement(R. 3).

These direct allegations were of specific facts.

The legal effect of Respondent's motion to dismiss was to admit these allegations, since under law that motion required the Court to assume Petitioners' ability to prove and to accept as true these direct allegations of fact. Inasmuch as a contractual relationship was in the instant case admitted under the pleadings, it is not necessary that Petitioners prove a contractual relationship existed between Petitioners and Respondent.

In *Orminski* v. *Hyland Electrical Supply Co.*, 326 Ill. App. 392, the action was for overtime wages as a truck driver at the hourly rates prescribed in written contracts

between plaintiff's union and defendant. Prior to filing suit in the Superior Court of Cook County, Illinois, Orminski was defeated in an action against defendant in the District Court of the United States for the Northern District of Illinois to recover overtime wages, liquidated damages and reasonable attorney's fees under provisions of the Fair Labor Standards Act of 1938. In the Superior Court the defendant successfully interposed as a bar to his suit the summary judgment rendered against him in the District Court. The Superior Court, upon motion of defendant, dismissed Orminski's suit. After order of dismissal was entered, Orminski moved for a ruling on that portion of defendant's motion which sought to strike from his complaint all claims for overtime pay not accruing within five years prior to commencement of the Superior Court suit. The Court denied his motion and sustained the motion of defendant. Upon the record before it, the Court held his action was barred by the Illinois five-year Statute of Limitations governing oral contracts, since it would be necessary to resort to parol evidence to show he was a member of his union and entitled to the benefits of the contract.

In the *Orminski* case it does not appear from the record that plaintiff there argued the legal effect of the motion to dismiss the complaint was to admit his direct allegations of fact. These allegations were:

> (1) That during the years 1934 to 1941, both inclusive, plaintiff, a member of the Chicago Truck Drivers, Chauffeurs and Helpers Union of Chicago, Local 705, was employed by defendant;
>
> (2) That successive written contracts were entered in to by the defendant and the union prescribing the weekly wages for truck drivers based on 51 hours a week, and increased hourly rates for additional work in any week;

(3) That during each year plaintiff worked a stated number of overtime hours without receiving the extra compensation specified in the contracts.

The law did not require Orminski to show by evidence, parol or otherwise, that he was a member of his union entitled to the benefits of the contract. These facts, must, under rules of pleading be considered as proven for him by the motion to dismiss his Complaint. Had he argued such was the legal effect of defendant's motion, the Appellate Court of Illinois would have had reason for finding the contract did not need the aid of parol testimony to establish it and was not subject to the bar of the Illinois five-year Statute of Limitations.

For the foregoing reasons, we urge the allowance of the Writ.

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Counsel for Petitioners.